Court, U.S.

No. 01-677 AUG 09 2001

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In the Supreme Court of the United States

CARMEN LEVERETTE,

Petitioner,

v.

MARGARET BELL, in her individual capacity,

Respondent.

and

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Defendant.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a visual body cavity search of a corrections officer based on mere reasonable suspicion, rather than probable cause, violate the Fourth Amendment's constitutional protection against unreasonable searches and seizures?

2. Are the parameters of a government official's discretionary authority for qualified immunity purposes established by the government agency's policies and practices?

3. Is a government official acting within the scope of her employment for qualified immunity purposes, when she knowingly acts contrary to the government agency's own rules and regulations?

PARTIES TO THE PROCEEDING

Petitioner
Carmen Leverette

Respondent
Margaret Bell

Defendant
South Carolina Department of Corrections

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Carmen Leverette v. Margaret Bell, et al.*, is reported at 237 F.3d. 160 (2001). Copies of that opinion, and the Order denying the Petition for Rehearing, are included in the Appendix at pages A-1 and A-16. The Orders of the District Court for the District of South Carolina are included in the Appendix at pages A-18 and A-19.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit filed its opinion in *Carmen Leverette v. Margaret Bell, et al.*, on April 13, 2001. The Court denied the Petitioner's Petition for Rehearing with Petition for Rehearing *En Banc*, on May 11, 2001. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1990, the Petitioner Carmen Leverette ("Leverette") went to work as a correctional officer for the South Carolina Department of Corrections ("SCDC"). In 1992, she was working as a prison guard at the Wateree River Correctional Institution ("WRCI").

SCDC Policy No. 1500.11 specifically limits individual searches of employees, inmate visitors, and others, to

"scan searches," "frisk searches," or "strip searches." The policy expressly prohibits body cavity searches of employees.[1]

Employees may be subjected to an individual search at the discretion of the institution head, who also determines the type of search to be conducted. A "strip search" of an employee must be based on specific, objective facts, supported by information from reliable sources, which must be reduced to writing prior to, or immediately after, the institution head (or other appropriate official) approves a request to search. The employee to be searched must sign a written consent before the search is conducted, and if the employee refuses to consent, she may be denied admission to, or ejected from, the facility, and disciplined.

In 1996, after a drug dog reacted to her car during a random search of all incoming vehicles, Leverette was strip searched, consisting of a strip, squat and cough, by the Respondent Margaret Bell ("Bell"), an assistant warden at WRCI, and two female correctional officers. The search revealed no contraband, and Leverette proceeded to her assigned work post. This was the only time Leverette was searched between 1992 and February 1998, and she had an excellent employment record as a correctional officer.

On February 2, 1998, a WRCI inmate allegedly informed Bell he had overheard other inmates talking about buying marijuana on the street, which Leverette was allegedly bringing into the institution in a tampon

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[1]At all times relevant to this action, Policy No. 1500.11 was the only policy regarding searches of SCDC employees. The policy has been superseded several times to the extent it relates to inmate searches.

when she returned to work on February 4. This informant, who has never been identified, had allegedly provided accurate information to other law enforcement agencies on previous occasions, and had told Bell about another inmate's possession of drugs.[2]

Bell discussed the matter with WRCI's warden, John Carmichael ("Carmichael"), who authorized Bell to conduct a "strip search" of Leverette when she arrived at the prison. Carmichael and Bell did not discuss a body cavity search, and Carmichael did not authorize such a search.

Leverette returned to work on February 4, and was immediately escorted into Bell's office, where Carmichael was waiting. Carmichael stated there was information Leverette was bringing contraband into the institution, and that she would be "strip" searched. Carmichael then summoned two female officers to Bell's office. Upon their arrival, Leverette was instructed to take off her clothes, which were searched by Bell and the officers.

When the search of her clothes and belongings was completed, Leverette started to put her clothes on, but Bell told her to wait until the institution's nurse arrived

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[2]During her deposition, Bell was unable to recall the inmate's name, or the names of the other inmates he allegedly overheard saying that Leverette was bringing drugs into the prison. Bell's knowledge regarding the inmate's previous work with other law enforcement agencies was merely an impression she got from conversations she overheard during a meeting in her office. She did not know the specifics, or accuracy, of the information the inmate allegedly provided to other agencies. As to the inmate's alleged information regarding another inmate, Bell could not even recall the identity of the inmate who allegedly possessed the drugs. In short, Bell's knowledge was remarkable only in terms of what she did not know about the inmate's reliability.

because they were going to do a "body cavity search."[3] Leverette sat in a chair, completely naked, until the nurse arrived. When the nurse entered the office, anyone standing in the lobby outside Bell's office had a clear view of Leverette.

After the nurse arrived, Bell started giving Leverette instructions regarding exposing her anal and vaginal orifices. Bell repeatedly said she could not "see," and Leverette was ultimately required to bend over to the point where her hands touched the floor in front of her, and then hold her buttocks apart, so that Bell and the nurse could closely examine her rectum. Leverette was then instructed to sit at the edge of a chair, and open her legs, so that Bell and the nurse could examine her vaginal opening. Again, Bell repeatedly said she could not "see," and Leverette had to open her legs wider, and ultimately, hold open her labia, with Bell and the nurse within a foot of her genital area.

The two female officers summoned to conduct the strip search were still present in the office, and both were extremely upset by the way Bell conducted the body cavity search of Leverette. Neither of the officers, nor the nurse, had ever participated in any employee searches such as the one to which Leverette was subjected.[4] None of these individuals witnessed Leverette sign any consent

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[3]Bell testified, and the Fourth Circuit found, that Bell and Carmichael discussed having the nurse present during the search. Carmichael testified, however, that he found about about the nurse's presence after the search was concluded. This is but one example of the Fourth Circuit's failure to view all the evidence in the light most favorable to Leverette.

[4]One of the officers was reduced to tears, and intimidated, by the way Leverette was treated.

form related to the routine strip search, or the body cavity search.[5]

The invasive search of Leverette's person and belongings revealed no contraband. After her vehicle was also thoroughly searched, Leverette was eventually allowed to proceed to her work station.

Leverette commenced this action in February 1999, alleging that Bell violated Leverette's constitutional rights under the Fourth Amendment. She also asserted a negligence claim against SCDC, which she voluntarily dismissed without prejudice. Bell moved for summary judgment, asserting the doctrine of qualified immunity, and filed an interlocutory appeal from the district court's denial of that motion.

The Court of Appeals for the Fourth Circuit reversed the denial of Bell's motion, and remanded the case for entry of judgment in Bell's favor. The court found that Bell was acting within the scope of her authority as an assistant warden of WRCI when she ordered and conducted the body cavity search of Leverette. It held that Bell was protected by the qualified immunity defense because body cavity searches of correctional officers need only be based on "reasonable suspicion," and since Bell had such suspicion arising from the alleged informant's information, the search at issue did not violate Leverette's constitutional rights. The Court subsequently denied Leverette's Petition for Rehearing with Rehearing En Banc.

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[5]When the search was over, Bell had Leverette sign a consent form, which related to "frisk" and "strip" searches, not body cavity searches.

REASONS FOR GRANTING THE PETITION

Visual body cavity searches of prison employees should be based on probable cause rather than mere reasonable suspicion, and there is a split in the circuits on this issue, which should be resolved.

The Fourth Amendment vests individuals with the right to be free from "unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979). A legitimate governmental purpose may render a particular intrusion into an individual's privacy reasonable. *Bell*, 441 U.S. at 558 (1979).

The government's interest in maintaining prison security has served as the basis for allowing certain warrantless searches of inmates, pretrial detainees, prison visitors, and prison employees. *Bell*, 441 U.S. at 560 (strip search of pretrial detainees); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (strip searches of prison employees based on reasonable suspicion); *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985), cert. denied, 475 U.S. 1016 (1986) (strip search of prison visitors requires reasonable suspicion); *Blackburn v. Snow*, 771 F.2d 556 (1st 1985) (strip search of prison visitors requires reasonable suspicion); *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187 (2nd Cir. 1984) (strip search of prison employees requires reasonable suspicion, but visual body cavity searches require a warrant based on probable cause). Prisons are not, however, beyond the reach of the Constitution. *Bell*, 441 U.S. at 547.

This Court has held that incarcerated individuals retain some Fourth Amendment rights. *Bell*, 441 U.S. at 558. Clearly, prison employees, as non-convicted, unincarcerated individuals, retain certain, albeit diminished, expectations of privacy while they are on the job. *Carey*, 737 F.2d at 201-202.

Visual body cavity searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission . . .." *Carey*, 737 F.2d at 207 (citations omitted); see also *Blackburn*, 771 F.2d at 564; *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894, 899 (1995). Such searches "represent one of the most grievous offenses against personal dignity and common decency." *Bell*, 441 U.S. at 576-577 (Marshall, J., dissenting). In concluding that body cavity searches on pretrial detainees were constitutional in light of the prison system's legitimate security concerns, this Court stated that "[a]dmittedly, this practice instinctively gives us the most pause." Id., 441 U.S. at 558.

Based on the prison employees' reasonable expectations not to be subjected to unreasonable intrusions into their privacy, balanced against the extent of the intrusion inflicted by visual body cavity searches, the Second Circuit held that such searches must be based on probable cause, and prison officials must obtain a warrant before subjecting a prison employee to a visual body cavity search. *Carey*, 737 F.2d at 207-208. The Fourth Circuit's holding in this case that visual body cavity searches of correctional officers need only be based on "reasonable suspicion," is directly contrary to the Second Circuit's decision in *Carey*. Review of this case will permit the Court to resolve the conflict between the

circuit courts regarding the extent to which correctional officers abandon their expectation of privacy, and waive their constitutional protection against unreasonable searches and seizures, by merely accepting employment in a correctional institution.

In concluding that the search at issue was a constitutionally permissible activity, the Fourth Circuit balanced Leverette's expectation of privacy against the prison system's "manifest interest in preventing the introduction of drugs, weapons, and other contraband." (Appendix at page A-12). When balancing these interests, however, the Fourth Circuit blatantly ignored the State of South Carolina's determination, by and through SCDC, that correctional facility employees' privacy rights are paramount on the issue of body cavity searches.

SCDC's policies and procedures provide for "strip" searches of employees on the basis of "specific objective facts supported by information from reliable sources that a specific person (the person to be searched) is attempting to introduce contraband into the institution." SCDC Policy No. 1500.11, ¶19. (Appendix at page A-28). The policy strictly governs the circumstances for conducting inmate body cavity searches, and specifically prohibits body cavity searches of employees. SCDC Policy No. 1500.11, ¶3 (Appendix at page A-22). As the prison system administrator, SCDC was clearly in the best position to balance the competing interests of the system and its employees, and it determined that at least with respect to body cavity searches, the employees' interests and expectations of privacy prevail.

In the face of this express policy prohibition of employee body cavity searches, as a SCDC employee,

Leverette's legitimate expectations of privacy included the right to be free of body cavity searches in the absence of a warrant based on probable cause.[6] The Fourth Circuit determined, however, that even with the prison system's express policy prohibition of such searches, "prison authorities generally may conduct a visual body cavity search when they possess a reasonable and individualized suspicion that an employee is hiding contraband on his or her person." (Appendix at page A-12).

In *Bell*, this Court admonished courts to accord deference to prison administrators in the adoption and execution of prison policies and practices they deem necessary to preserve prison security. 441 U.S. at 547. Obviously, SCDC did not deem it necessary to prison security to institute a policy requiring prison employees to submit to body cavity searches of any kind.[7] Rather than defer to SCDC's decision, however, the Fourth Circuit substituted its judgment for the prison administrator's judgment regarding the proper balance of

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[6]This case does not involve "exigent circumstances" that might constitute an exception to the warrant requirement. There was ample time between Bell's alleged receipt of the information, and Leverette's scheduled return to work, for Bell and/or Carmichael to put their information before a judge and seek a search warrant.

[7]There is no evidence in the record that SCDC in general, or WRCI in particular, had experienced a significant problem with prison employees hiding contraband in body cavities. See *Carey*, 737 F.2d at 208 (absence of evidence that correction officers had carried contraband into the subject correctional facilities in their body cavities indicated that body cavity searches were not related to any legitimate penological objective).

the competing interests.[8]

Leverette does not contend that a search warrant is required for routine "strip" searches of employees, which required the employee to disrobe, squat, and cough, if the prison officials have a reasonable suspicion that the employee may be bringing contraband into the prison. She does contend, that the information Bell received in this case, which consisted of an alleged uncorroborated tip from an unidentified inmate, based on pure hearsay rather than personal knowledge, did not constitute "reasonable suspicion." Even if the strip search was appropriate, however, the visual body cavity search went far beyond the established procedures for strip searches.[9]

Leverette did not subjectively waive her expectation of privacy relating to body cavity searches (visual or manual) by merely accepting employment with the prison system. The policies and procedures in effect during her employment expressly evidenced the prison system's recognition of that expectation. The visual body cavity search at issue clearly violated Leverette's reasonable expectation of privacy, and contravened her Fourth Amendment right to be free of unreasonable searches.

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[8]The Fourth Circuit attempted to draw a distinction between "visual" and "manual" body cavity searches, even though the S.C.D.C. policies make no such distinction. Given the extent of the visual body cavity search in this case, which stopped just short of a manual probe of Leverette's body cavities, the Fourth Circuit essentially drew a distinction without a difference. In any event, as the Second Circuit noted in *Carey*, "a visual body cavity search is nearly as degrading as a manual probe of a body cavity itself." Id. at 208.

[9]As discussed above, the nurse and two female correctional officers who witnessed the search testified they had never participated in any similar searches during their employment with SCDC.

The Fourth Circuit's opinion in this case is contrary to law, and must be reversed.[10]

> A government agency's policies and practices define the parameters of an official's discretionary authority for qualified immunity purposes, and government officials who knowingly act contrary to the agency's policies and practices are not entitled to the qualified immunity defense.

Government officials may be shielded from individual liability for damages arising from acts within the scope of their discretionary authority, provided their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether an official was acting within the scope of his authority, the court must examine what a reasonable official in the defendant's position would have understood the limits of his authority to be, and the official cannot claim qualified immunity for acts he knows to be totally beyond the scope of his authority. *In re Allen*, 106 F.3d 582, 593 (4th Cir. 1997).

The statutes and regulations governing an official's position at the time in question, rather than case law regarding the reach of clearly established statutory or constitutional rights, will most often govern the scope of the official's authority. *Doe v. McMillan*, 412 U.S. 306, 321-324 (1973) (official's authority defined by statutes dictating duties of the Public Printer and Superintendent

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[10]Since the Fourth Circuit held that the search was constitutionally permissible, it did not reach the question of whether the right at issue was "clearly established."

of Documents); *Allen*, 106 F.3d at 595 (statutes regarding duties of state attorney general defined scope of authority); *Lenz v. Winburn*, 51 F.3d 1540, 1546-47 (11th Cir. 1995) (Florida statutes and training manual for Florida guardian ad litem program defined scope of guardian ad litem's authority).

In this case, the Fourth Circuit held that since prison assistant wardens routinely supervise searches, including strip searches and body cavity searches, Bell was acting within the scope of her employment for purposes of analyzing her entitlement to the qualified immunity defense. In reaching this conclusion, the Fourth Circuit ignored the SCDC policies governing Bell's position at the time she conducted the visual body cavity search at issue. Those policies significantly limited the scope of Bell's discretionary authority when ordering and supervising searches, and expressly prohibited the search at issue.

Under SCDC Policy No. 1500.11, wardens (institution heads) are the only officials authorized to ask employees to submit to a "strip" search, and assistant wardens may order such searches only if the warden is absent from the prison. SCDC Policy No. 1500.11, ¶19, Appendix at page A-28. The WRCI warden, Carmichael, was physically present at the prison when Leverette was searched. Therefore, Bell had no discretionary authority to decide whether to search Leverette, or to determine the scope of the search to be conducted.

Carmichael and Bell testified they discussed the Leverette matter on February 2, 3, and 4. Carmichael expressly stated he only authorized a "strip" search during their discussions, and a "body cavity" search was

never discussed or authorized.[11] Since Carmichael only authorized a "strip" search, Bell clearly exceeded the scope of her extremely limited authority when she expanded the search to include a visual body cavity search.

Bell testified that she sought Carmichael's approval before searching Leverette, and that having Leverette squat and cough was "still within policy." Incredibly, Bell claimed the search then expanded only because Leverette herself "suggested" that she bend over further, and manually spread her buttocks and labia, so Bell and the nurse could get a better view.

Bell's acknowledgement that Carmichael's approval was required, and that certain things were "still within policy," combined with her attempt to shift responsibility for the expanded search to Leverette, clearly reveals she was well aware she did not have authority to order any search under the circumstances, and that a visual body cavity search exceeded the scope of the authority she

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[11]Bell testified she informed Carmichael the informant alleged the drugs would be concealed in a tampon, but they never discussed what to do if Leverette was wearing a tampon. Carmichael only recalled that Bell told him the drugs would be "on [Leverette's] person," "in [Leverette's] clothing," or that it might be in a body cavity. Even with that knowledge, Carmichael did not authorize a body cavity search.

received from Carmichael.[12] Given that knowledge, Bell should not be afforded the protection of the qualified immunity doctrine. See *Long v. Norris*, 929 F.2d 1111, 1116-18 (6th Cir. 1991) (qualified immunity did not bar suit against prison officials who violated prison regulations prohibiting strip searches without probable cause). Accordingly, the Fourth Circuit's decision on this issue should be reversed.

CONCLUSION

Even considering the security issues inherent in administering the prison system, prison employees do not waive all Fourth Amendment protection by simply accepting employment in the prison system. Allowing prison officials to conduct visual body cavity searches of prison employees on less than probable cause, and in the absence of exigent circumstances, in essence gives the employees less constitutional protection than the inmates they are hired to guard.

The Fourth Circuit's decision in this case directly conflicts with the Second Circuit's decision in *Security and Law Enforcement Employees v. Carey*, supra, which held that prison officials must have a warrant, based on probable cause, prior to conducting visual body cavity searches of prison employees. The Second Circuit's

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[12]In addition to going beyond the scope of the search authorized, Bell did not 1) obtain Leverette's consent prior to conducting the search, 2) maintain the signed consent form for subsequent review, or 3) reduce her basis for the search to writing either prior to or immediately after the search (waiting nineteen days), all of which are expressly required by Policy 1500.11. The Fourth Circuit avoided the impact of these cumulative omissions by classifying them as mere technical, and unimportant, deviations from SCDC's formal policies and procedures. (Appendix at pages A-14 - A-15)

reasoning is sound, and reflects the same balancing of the prison system's security concerns and the employees' constitutional rights as that embodied in SCDC's policies and procedures. The Fourth Circuit ignored the balance reflected in those policies and procedures, and improperly substituted its own judgment for the judgment of South Carolina's prison administrators.

SCDC also determined specific parameters for authorizing employee searches, including express limitations on the officials authorized to determine if an employee can be searched, and the scope of the search to be conducted. The Fourth Circuit ignored those parameters in holding that Bell acted within the scope of her authority in connection with the search at issue. Bell knowingly exceeded her authority, and should not be afforded qualified immunity protection. Accordingly, the Fourth Circuit decision should be reversed.

This the 9th day of August, 2001.

Respectfully Submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Fourth Circuit, *Carmen Leverette v. Margaret Bell, et al.*, No. 00-1407 (April 12, 2000) A-1

Order Denying Petition for Rehearing and Rehearing En Banc in *Carmen Leverette v. Margaret Bell, et al.*, No. 00-1407 (May 11, 2000) A-16

Order of the United States District Court for the District of South Carolina, *Carmen Leverette v. The South Carolina Department of Corrections and Margaret Bell*, Civil Action No. 3:99-0501-10 (March 8, 2000) A-18

Amended Order of the United States District Court for the District of South Carolina, *Carmen Leverettev. The South Carolina Department of Corrections and Margaret Bell*, Civil Action No. 3:99-0501-10 (March 14, 2000)..... A-19

South Carolina Department of Corrections, Policy No. 1500.11 ..... A-21

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 00-1407

CARMEN LEVERETTE,
Plaintiff-Appellee,

v.

MARGARET BELL, in her individual capacity,
Defendant-Appellant,

And

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,
Defendant.

Appeal from the United States District Court for the District of South Carolina, at Columbia.
Matthew J. Perry, Jr., Senior District Judge
(CA-99-501-3)

Argued: December 8, 2001

Decided: April 13, 2001

Before WILKINSON, Chief Judge, and WILKINS and KING, Circuit Judges.

Reversed and remanded by published opinion. Judge King wrote the opinion, in which Chief Judge Wilkinson and Judge Wilkins joined.

COUNSEL

ARGUED: Vance Earle Drawdy, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, L.L.C., Greenville, South Carolina, for Appellant. James Lewis Cromer, CROMER & MABRY, Columbia, South Carolina, for Appellee. ON BRIEF: Scott Timothy Justice, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, L.L.C., Columbia, South Carolina, for Appellant. Edward C. Boggs, CROMER & MABRY, Columbia, South Carolina, for Appellee.

OPINION

KING, Circuit Judge:

Plaintiff Carmen Leverette, an employee of South Carolina's Wateree River Correctional Institution ("WRCI"), brought this suite against Margaret Bell, the Associate Warden of WRCI, alleging that Bell had violated her Fourth Amendment right against unreasonable searches and seizures by conducting a visual body cavity search of Leverette's person. Leverette seeks damages pursuant to 42 U.S.C. § 1983. Along with her § 1983 claim, Leverette advanced a common-law negligence claim against the South Carolina Department of Corrections ("SCDC"). Upon the defendants' motion for summary judgment, the district court rejected Bell's assertion of qualified immunity, and that assertion is the sole issue before us in this interlocutory appeal. Because we conclude that the challenged search was constitutionally permissible, we reverse the denial of

summary judgment and remand so that judgment may be entered in Bell's favor.

I.

A.

Leverette was hired by SCDC as a correctional officer in December 1990, and she transferred to the WRCI facility in 1992. In April 1998, she was promoted from correctional officer to program assistant, a non-uniformed position that she continues to occupy. Prior to her promotion, Leverette had been subjected to two strip searches, both of which were authorized by John Carmichael, Warden of WRCI, pursuant to the prison's efforts to interdict drugs and other contraband. The first such search was conducted in 1996, after an SCDC drug dog reacted to scents in Leverette's vehicle during a random search of all vehicles entering WRCI; that search, consisting of a strip, squat, and cough, was conducted by Bell and two female correctional officers and yielded no contraband. The second search, a visual body cavity search of Leverette, was carried out at WRCI on February 4, 1998, and is the subject of this lawsuit.

On February 2, 1998, a WRCI inmate informed Bell that some of the other prisoners had schemed to buy marijuana "on the street," and that Leverette was planning to smuggle the marijuana into the prison by concealing it in a tampon. The inmate-informant, whose identity has not been disclosed, had on prior occasions provided accurate tips to the Sumter County Drug Task Force and to SCDC Internal Affairs. Based on information obtained in a meeting Bell attended with members of the Drug Task Force and Internal Affairs, she believed the inmate's information concerning Leverette to be reliable.

That evening, Bell called her supervisor, Warden Carmichael, to relay the information obtained from the inmate's tip. After the call, but prior to Leverette's

scheduled return to work on February 4, Bell and Carmichael met to discuss the tip. In the course of their discussion, Carmichael directed Bell to conduct a strip search of Leverette upon the latter's arrival at work on February 4. Bell recalled raising the possibility that Leverette would be wearing a tampon and suggesting that a female medical professional be present, in light of the "personal" nature of the examination. J.A. 421. Bell further testified that no specific decision was made at that time as to what procedures to follow if a tampon were discovered.

Bell and Carmichael reconvened on the morning of February 4, in order to finalize the logistics and procedures of the search. It was then determined that the search of Leverette would be conducted in Bell's office and that a female nurse supervisor would be present, along with two female correctional officers. When Leverette arrived at WRCI to work, she was accompanied to Bell's office and advised by Carmichael that the prison had received a tip that she was carrying contraband. Before leaving the office, Carmichael stated, "[Y]ou know the procedure on this. We are going to have to do a strip search." J.A. 146-47.

Shortly after Leverette was so advised by Carmichael, the female correctional officers were beckoned to Bell's office to conduct the search. After the warden departed, the office door was closed; the blinds were drawn shut, and Leverette began to disrobe. Bell and the officers first searched Leverette's clothing and lunch container, but they detected nothing. Leverette testified that once her clothing and lunch container had been searched, she was told that they were waiting for the nurse because, Bell stated, "[W]e are going to do a body cavity search." J.A. 149. Still naked, Leverette was seated for four or five minutes until the nurse arrived.

In her deposition, Leverette described the activities that ensued:

> I stand up and they are surround[ing] me, [the nurse] and Ms. Bell, and they are not saying anything, but I know she said body cavity search. So I kind of like bend over and they are looking. And Ms. Bell said she can't see, so I bend over a little more, and she stated she couldn't see again. So I bend over a little more, and the third time she says she couldn't see, so I just bent all the way down and put my hand on the floor so she could see. And after that they are there.
>
> So after I bent over I went to sit down. So they are bent down. [The nurse] she is bent down. I am opening my legs and she is looking in my vagina and Ms. Bell said they couldn't see. So I opened my legs again and Ms. Bell said she couldn't see. So I opened them a third time and opened them as far as I could get them. I said, "Ms. Bell, how far do you want me to open them?" and after that they looked, and then [the nurse] looked up at Ms. Bell and just like nod her head like everything was okay, and that was it.

J.A. 150.

After getting dressed, Leverette asked who the informant was; Bell replied that it was an inmate but declined to reveal the informant's name. Bell then left the office briefly, returning "with a consent to be strip searched and a consent to be frisk searched." J.A. 151. Leverette recalled signing the frisk search area of the form; when it was noticed that the wrong section had been signed, Leverette complied with Bell's request that she complete a written strip search consent. Although Leverette requested a copy of the signed consent form, she apparently never received one.

B.

In February 1999, Leverette brought suit in the District of South Carolina against Bell, in her individual capacity, for violating Leverette's constitutional rights under the Fourth Amendment, and against SCDC, for negligence.[1] Following extensive discovery, the defendants filed a motion for summary judgment on all of Leverette's claims. Leverette assented to the voluntary dismissal, without prejudice, of her negligence claim, leaving only her § 1983 claim against Bell. Bell moved for summary judgment solely on the basis of qualified immunity. After hearing argument on the immunity issue, the district court denied Bell's motion for summary judgment, and Bell timely filed this interlocutory appeal. We possess jurisdiction over this appeal pursuant to the collateral order doctrine. *See Winfield v. Bass*, 106 F.3d 525, 528-29 (4th Cir. 1997) (en banc) ("To the extent that an order of a district court rejecting a governmental official's qualified immunity defense turns on a question of law, it is a final decision within the meaning of § 1291 under the collateral order doctrine[.]") (citing *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985) (other citations omitted)).

II.

We review de novo a district court's denial of summary judgment. *Hodge v. Jones*, 31 F.3d 157, 163 (4th Cir. 1994). Where, as here, the district court did not fully set forth the facts supporting its legal conclusion denying qualified immunity, we must review the materials submitted to the district court to determine what the record disclosed, viewing the facts in the light most favorable to the non-moving party. *See Winfield*, 106 F.3d at 533.

Before evaluating the merits of Bell's qualified immunity defense, we must establish her official status,

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[1]The negligence claim focused primarily on SCDC's failure to observe its own procedural protections regarding employee strip searched. *See infra* Part III.

i.e., whether she conducted the challenged search while acting within the scope of her authority as Associate Warden of WRCI. *See In re Allen*, 106 F.3d 582 (4th Cir. 1997). Although Leverette insists that, under *Allen*, Bell's actions in conducting the search were outside of the scope of her authority, we find this argument unpersuasive.

Allen instructs that "an official may claim qualified immunity as long as his actions are not clearly established to be beyond the boundaries of his discretionary authority." *Id.* at 593. The relevant consideration under *Allen*, though, is not whether the official's actions were a proper, or even legal, exercise of her discretionary authority. *See id.* at 594. ("If these were the relevant inquiries, any illegal action would, by definition, fall outside the scope of an official's authority. To equate 'the question of whether the defendants acted lawfully with the question whether they acted within the scope of their discretion' is 'untenable.'") (quoting *Sims v. Metro. Dade Co.*, 972 F.2d 1230, 1236 (11th Cir. 1992)) (internal citations omitted). Rather, we must ask whether a reasonable official in Bell's position should have known that the conduct was clearly established to be beyond the scope of her authority. *Id.*

As Leverette correctly observes, we have on occasion sought guidance from statutes and regulations in delineating the "outer perimeter" of an official's discretionary authority. *See* Appellee's Br., at 20-21 (citing *Allen*, 106 F.3d at 595).[2] While formal sources are

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[2]In *Allen*, we denied an immunity defense to the Attorney General of West Virginia, who had allegedly directed that an entity be incorporated in order to prevent an out-of-state organization from incorporating in West Virginia by the same name. Looking to West Virginia statutory provisions defining the responsibilities vested in the Attorney General, we concluded that the defendant could not reasonably have considered the incorporation of fictitious entities to fall within his carefully circumscribed authority. As such, he was acting not as the Attorney General, but as a private individual. *See* 106 F.3d at 598.

instructive, a defendant does not lose official status for purposes of qualified immunity analysis simply by failing to adhere to an agency's stated policies. Leverette urges us to treat Bell's alleged reference to the "body cavity search" – as well as her testimony that having Leverette squat and cough was "still within policy" – as probative of her knowledge that the search transgressed SCDC Policy 1500.11. That policy provides for strip searches of SCDC employees only if justified by "specific objective facts" and conducted according to its procedural guidelines. *See* J.A. 615. It explicitly states, however, that employees "will not be subjected to body cavity searches." J.A. 611.

The parties disagree as to the proper classification of the search that occurred in this case. While it appears to have been more invasive than a standard strip search – requiring the subject to disrobe, squat, and cough – it also does not qualify as a true body cavity search.[3] Thus, it is not clear that Bell engaged in conduct specifically precluded by SCDC policy. Moreover, to the extent that the search did not conform to SCDC procedures – for example, the inmate's tip was not "reduced to writing prior to or immediately subsequent to the approving authority's decision" – we are not inclined to regard such

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[3]Courts examining the constitutionality of physically intrusive searches have distinguished between strip searches, visual body cavity searches, and manual body cavity searches. A "visual body cavity search" requires the searched individual to expose her anal and vaginal cavities for visual inspection, whereas a "manual body cavity search" typically involves digital touching or probing by another person. *See, e.g., Blackburn v. Snow*, 771 F.2d 556, 561 n.3 (1st Cir. 1985). The SCDC policy proscribing employee body cavity searches does not, however, specify the scope of such prohibition. Elsewhere, the SCDC policy governing inmate searches contemplates manual searches. Even if, as Leverette emphasizes, the policy governing inmate searches is inadmissible, it does suggest that there was at least a factual questions as to whether the prohibition contained in Policy 1500.11 extended to visual body cavity searches.

nonconformance as sufficient to take Bell's conduct beyond the "outer perimeter" of her discretionary authority. In the context of an *Allen* analysis, an official's responsibilities are to be defined expansively. *See, e.g., Harbert Int'l v. James*, 157 F.3d 1271, 1282-83 (11th Cir. 1998) (noting that the inquiry must be "properly defined," looking at the general class of conduct, e.g., transporting and delivering prisoners, rather than the specific unlawful conduct alleged, e.g., improperly transferring prisoners or placing them in inadequate facilities). To regard noncompliance with internal policies as necessarily removing an official from the realm of immunity would, in effect, erode that crucial defense. *See Allen*, 106 F.3d at 594. There is no question that assistant wardens of correctional facilities routinely supervise searches – including strip searches and even, under some circumstances, body cavity searches – and, thus, that Bell was acting within the scope of her authority for *Allen* purposes.

III.

Under our *Allen* decision, Bell, as Associate Warden of WRCI, is clearly entitled to assert the defense of qualified immunity. Whether the defense is valid in Bell's case, however, requires us to conduct a two-step, sequential analysis. Initially, we must determine de novo whether the facts, viewed in the light most favorable to Leverette, establish the deprivation of an actual constitutional right. *See Hartley v. Parnell*, 193 F.3d 1263, 1268 (4th Cir. 1999) (citing *Wilson v. Layne*, 526 U.S. 603, 609 (1999)). If so, we proceed to consider whether that right was clearly established at the time of the purported violation. *Id.*[4]

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[4]The applicable authorities dictate that we analyze the constitutionality of the challenged search before addressing whether the law was "clearly established." Thus, we cannot bypass, and thereby evade, a constitutional determination wherever the law is uncharted or ambiguous. *See Milstead v. Kibler*, No. 00-1539, 2001 WL 256045, *3 (4th Cir. March

Leverette maintains that the February 1998 search constituted a deprivation of her Fourth Amendment right against unreasonable searches and seizures, and that a reasonable officer in Bell's position would have known that her conduct violated a "clearly established" right. To support this position, Leverette relies primarily on SCDC's explicit policy against subjecting employees to body cavity searches. Bell denies that she conducted a "body cavity search" as prohibited by SCDC policy. In any case, she contends that the search was reasonable, and that, even if ultimately ruled unconstitutional, the law was not "clearly established" at the time of the search. We agree with Bell, and we conclude that the search, as conducted, was reasonable and consistent with Leverette's Fourth Amendment rights.

In analyzing the reasonableness of a physically intrusive search, we must balance the government's need for the particular search against the invasion of personal rights entailed by the search. *See Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). More specifically, we must evaluate "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559.

Although the parties quarrel as to the proper definition of the contested search – Bell resisting Leverette's contention that it constituted a "body cavity search," as specifically prohibited by SCDC policy – the reasonableness of the search cannot rest on semantics. Leverette has essentially conceded that a routine strip search would have been proper. *See* Appellee's Br., at 18 ("Had Bell simply asked Leverette to remove clothing,

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15, 2001) ("Were courts to rule on qualified immunity without determining the constitutionality of the challenged conduct, 'standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals.'") (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 844 n.5 (1998)).

squat and cough[,] this lawsuit may never have happened.") Instead, Leverette was allegedly told that a body cavity search was to be conducted and was encouraged to expose her anal and vaginal cavities for visual inspection. Whether this search constituted a "body cavity search," specifically prohibited by SCDC Policy, it appears in any event to have deviated from SCDC's strip search procedures. *See* SCDC Policy 2100.3-23, J.A. 615. That discrepancy does not, however, necessarily render the search constitutionally unreasonable.

While this court has not addressed the standard applicable to the authorization of visual body cavity searches on prison employees, our decision is informed by the Supreme Court's decision in *Bell v. Wolfish*, along with relevant decisions of our sister circuits. In *Bell v. Wolfish*, the Court upheld a prison's practice of conducting visual body cavity searches on inmates following every contact visit – that is, absent individualized suspicion. 441 U.S. at 560. Emphasizing the "unique" security concerns present in the prison context, the Court concluded that, "[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates," visual body cavity inspections may be conducted on inmates on less than probable cause. *Id.*

The Court's decision in *Bell v. Wolfish* made clear that the "unique security dangers" present in correctional facilities may justify even the most intrusive searches, and its conclusion also reflects, inter alia, the severely abridged privacy interests of prisoners. Thus, it leaves unresolved the circumstances and standards under which prison visitors and employees may be subjected to strip and body cavity searches. Several of our sister circuits, however, have examined issues concerning the privacy rights of prison visitors and employees, concluding that prison authorities must have at least a reasonable suspicion that the individual is bearing contraband before conducting an invasive search. *See, e.g., Spear v.*

Sowders, 71 F.3d 626, 630 (6th Cir. 1995) (regarding as "clearly established" the requirement that officials have reasonable suspicion before conducting strip or body cavity search of visitors, although authorities "need not secure a warrant or have probable cause"); *Blackburn v. Snow*, 771 F.2d 556, 562 (1st Cir. 1985) ("[A] rule requiring all prison visitors to submit to a body cavity strip search, without any predicate requirement of individualized suspicion or showing of special and highly unusual institutional need, cannot satisfy the Fourth Amendment."); *Thorne v. Jones*, 765 F.2d 1270, 1276 (5th Cir. 1985) (applying reasonable suspicion standard to strip searches of prison visitors); *cf. Sec. & Law Enforcement Employees v. Carey*, 737 F.2d 187, 204, 208 (2d Cir. 1984) (adopting reasonable suspicion standard for strip searches of correctional officers, but holding that a search warrant must be obtained before conducting a visual body cavity search).

We recognize that a prison employee such as Leverette does not forfeit all privacy rights when she accepts employment. Her expectations of privacy are, however, diminished in light of the prison's manifest interest in preventing the introduction of drugs, weapons, and other contraband. *See Sec. & Law Enforcement Employees*, 737 F.2d at 204. We consequently must reject Leverette's contention that this search was constitutionally impermissible. Instead, we conclude that prison authorities generally may conduct a visual body cavity search when they possess a reasonable and individualized suspicion that an employee is hiding contraband on his or her person. Our position on this point is bolstered by our sister circuits' decisions applying the reasonable suspicion standard to searches of prison visitors. *See, e.g., Spear*, 71 F.3d at 630; *see also Sec. & Law Enforcement Employees*, 737 F.2d at 204 (cataloguing the "significant parallels between visitors to correctional facilities and correction officers who work in them.").

We emphasize that reasonable suspicion is the minimum requirement, and point out that the more personal and invasive the search activities of the authorities become, the more particularized and individualized the articulated supporting information must be. In this instance, we are satisfied that the supporting information was more than adequate. The information was particularized and individualized, i.e., that Leverette was bringing contraband into the prison in a tampon on a specific occasion. *See, e.g., Hunter v. Auger*, 672 F.2d 668, 675 (8th Cir. 1982) (requiring, under reasonable suspicion standard, "individualized suspicion, specifically directed to the person targeted for the strip search" and "reasonable cause to believe that drugs or other contraband are concealed in the particular place they decide to search"). It also bore indicia of reliability, i.e., the inmate-informant had provided accurate drug-related tips in the past. *See, e.g., Spear*, 71 F.3d at 631 (reasonable suspicion satisfied where inmate-informant "had provided accurate and important information on at least one prior occasion").[5] Additionally, the decisionmaking process in this matter was entirely orderly and reasonable; Bell evaluated the information and consulted with her supervisor, Warden Carmichael, as to the proper handling of this difficult matter. Finally, the search itself, although exceedingly personal in nature, was administered in a sensitive and professional manner. The officials involved were all female, the search activity

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[5] As courts have observed elsewhere, an informant's status as a convicted felon does not necessarily impugn his reliability. *See Spear*, 71 F.3d at 631 n.3 ("[Plaintiff] makes much of the fact that the confidential informant was a convicted felon. However, a criminal conviction is a prerequisite for the role of prison informant.") Nor does the fact that no drugs were ultimately detected indicate the absence of reasonable suspicion; the reliability of a tip must not be evaluated in hindsight, but must be viewed at the time the search becomes necessary. *See, e.g., Lindsey v. Storey*, 936 F.2d 554, 559 (11th Cir. 1991) ("[M]ore is required than a mere hindsight determination of whether reasonable suspicion existed at the time of the seizure[.]").

was conducted in a private setting, and it was handled with dispatch. *See generally Bell*, 441 U.S. at 559 (requiring courts to evaluate the manner in which a strip search or body cavity search is conducted); *also Amaechi v. West*, 237 F.3d 356, 364 (4th Cir. 2001) ("[W]e have repeatedly emphasized the necessity of conducting a strip search in private."); *Justice v. City of Peachtree City*, 961 F.2d 188, 193 (11th Cir. 1992) (regarding the sex of the officers conducting the strip search as a relevant factor in evaluating its intrusiveness).

Leverette also emphasizes that Bell failed to comply with SCDC's internal policies regarding employee searches. Beyond the challenged physical intrusiveness of the search, Leverette objects that Bell waited nineteen days to reduce to writing the specific facts justifying the search, rather than recording them at the time the search was authorized. Leverette further notes that her signed consent was not obtained "until after the search was conducted, in clear contravention of SCDC Policy 1500.11." Appellee's Br., at 22. Once obtained, the consent form was improperly filed, in violation of SCDC's "standard operating procedure." *Id.*[6]

We find these contentions unavailing. That the search deviated from SCDC's formal policies and procedures does not render it unreasonable under the Fourth Amendment. Even if SCDC's policy against conducting body cavity searches on employees was violated here, such a violation does not in itself rise to constitutional dimensions.

IV.

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[6] The validity and effect, if any, of Leverette's written consent has not been raised on appeal by either party and is not before us. Its existence – and the manner and timing of its execution – is simply part of the factual scenario underlying this case.

Given our conclusion that no constitutional violation occurred, we need not reach the second step of the *Wilson v. Layne* qualified immunity analysis – that is, examining whether the law was "clearly established" at the time of the challenged conduct. *See supra* note 4. Bell was involved in a constitutionally permissible activity while acting in the scope of her authority as Associate Warden of WRCI, and she is therefore entitled to qualified immunity. Accordingly, we reverse the district court's order denying qualified immunity and remand for entry of judgment in Bell's favor.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

(Filed May 11, 2001)

No. 00-1407
CA-99-501-3

CARMEN LEVERETTE

Plaintiff – Appellee

v.

MARGARET BELL, in her individual capacity

Defendant – Appellant

and

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Defendant

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Conner
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
(Filed March 8, 2000)

CARMEN LEVERETTE,	CIVIL ACTION NO. 3:99-0501-10
Plaintiff,	
vs.	
THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS and MARGARET BELL, in her individual capacity,	**ORDER**
Defendants.	

This matter is before the Court pursuant to a motion by the defendants for summary judgment. Upon consideration of the motion, the memoranda and the oral arguments of counsel, the Court has determined that the motion must be and is hereby *DENIED.*

IT IS SO ORDERED.

/s/ Matthew J. Perry Jr.
Matthew J. Perry, Jr.
Senior United States
District Judge

Columbia, South Carolina,

March 7, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
(Filed March 14, 2000)

CARMEN LEVERETTE, Plaintiff,	CIVIL ACTION NO. 3:99-0501-10
vs.	
THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS and MARGARET BELL, in her individual capacity, Defendants.	AMENDED ORDER

This matter is before the Court pursuant to a motion by the defendants for summary judgment. At the hearing, the plaintiff abandoned the cause of action for negligence against the South Carolina Department of Corrections and consented to dismissal of the action without prejudice as to that defendant. Upon consideration of the motion, the memoranda and the oral arguments of counsel on the remaining issues, the Court has determined that the motion must be and is hereby denied.

IT IS SO ORDERED.

/s/ Matthew J. Perry Jr.
Matthew J. Perry, Jr.
Senior United States
District Judge

Columbia, South Carolina,

March 13, 2000

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
RESTRICTED

NUMBER: 1500.11 (15/11) / DATE: January 15, 1992

RESPONSIBILITY AUTHORITY: Deputy Commissioner For Operations

RELATED ACA/CAC STANDARDS: 2-2171, 2-4192, 2-4193, 2-4194, 2-4195, 2-4344

TITLE: Searches for Contraband

PURPOSE: To prescribe policy and procedures to govern the proper conduct of searches of SCDC facilities, inmate and others to detect contraband, prevent access to contraband by inmates, and thereby help ensure the safety and welfare of all inmates, employees and others assigned to and/or associated with this Agency.

POLICY: Searches of employees, inmates, visitors, and other persons as well as vehicles and facilities will be conducted to discover and/or preclude inmate possession of anything considered to be contraband and/or detrimental to the general safety and welfare of all concerned. Searches will be conducted in a professional manner and will not be made for the purpose of harassment.

PROCEDURAL GUIDELINES:

1. INDIVIDUALS AND VEHICLES SUBJECT TO SEARCH. All people, including SCDC employees, official visitors, vendors, contractors, inmates, and inmates' visitors; and all vehicles entering or leaving departmental property are subject to search.

2. SEARCHES - GENERAL. All searches of people will be conducted in a professional and courteous manner. Should force be necessary to search an inmate, a Use of Force Report will be prepared and submitted.

Force will not be used to search visitors, employees or any other people. However, refusal to submit to a search will constitute a reason to deny admission to a facility and/or a reason to eject the person from a facility and/or property. When an inmate's visitor refuses to submit to a search and/or permit a search of his privately owned vehicle, the visit will be denied and the Institution Head will be notified via a written report. When any other person refuses to submit to a search and/or permit a search of a privately owned vehicle, the Institution Head will be notified via a written report.

3. INMATE BODY CAVITY SEARCHES. SCDC Policy 2100.3-23 is the only authority for inmate body cavity searches. Other people, such as visitors, employees or any other persons, will not be subjected to body cavity searches.

4. VEHICLE SEARCHES. All vehicles and supplies entering or leaving the confines of a medium or maximum security institution shall be thoroughly inspected for concealed contraband and inmates. At minimum security facilities, the Institution Head will determine the method of such inspections. Every precaution shall be taken to ensure the vehicle or its contents do not afford a means of escape for an inmate from any institution of the SCDC. Employees are prohibited from utilizing tools or other instruments to open vehicle compartment. In cases where compartments cannot be opened by the vehicle driver or occupant, the visitor(s) will not be allowed to bring the vehicle into the secure areas that are accessible to inmates.

5. TYPES OF INDIVIDUAL SEARCHES: Individual searches will be limited to three types. They are:

a. Scan search, using a metal detector (where available)

b. Frisk search

c. Strip search

6. SEARCH OF MALES AND FEMALES. Searches prescribed in this policy apply equally to males and females. Strip searches performed on employees, visitors, and other individuals must be performed by an employee of the same sex as the person being searched. Strip searches of inmates must also be performed by an employee of the same sex as the person being searched except in extreme emergencies.

7. SEARCH OF EMPLOYEES. On duty and off duty departmental employees may be searched at the discretion of the Institution Head when entering, while within, and when departing an institution. The type search will also be at the discretion of the Institution Head. Likewise, an employee's privately owned vehicle may be searched while on state property at a SCDC facility. Employees who refuse to be searched and employees who refuse to permit their privately owned vehicle to be searched may be subjected to appropriate disciplinary action pursuant to SCDC Policy 200.2-1 Progressive Employee Discipline.

8. SEARCH OF INMATES. Inmates may be subjected to a scan search, a frisk search or a strip search. Additionally, their personal effects, their cells/room, their common living areas, their work areas and other areas may be subjected to unannounced and irregularly timed searches.

9. SEARCH OF INMATES' VISITORS. Inmates' visitors may be subjected to a scan search, a frisk search or a strip search. However, before an inmate's visitor is subjected to a strip search, authorization must be obtained from the Institution Head or in his/her absence, an assigned Deputy Warden, or when no Deputy Warden is present, from the assigned Captain. (Authority to authorize a strip search is not to be delegated below Deputy Warden/Deputy

Superintendent or the Captain level.) Prior to granting authorization to conduct a strip search, the authorizing official must ensure that available facts and/or reasonable suspicions exist to indicate that a specific visitor is attempting to introduce contraband into the facility. Additionally, the authorizing official must ensure that the visitor has completed the applicable parts of SCDC Form 19-95, Request for a Body Search, and consents in writing thereon to be strip searched.

10. SEARCH OF OTHERS. Other people such as official visitors, inspectors, vendors, contractors, inmates attorneys and volunteer workers may be subjected to a scan search, a frisk search or a strip search. However, a strip search will not be conducted until all provisions of the preceding paragraph are met. Likewise, the privately owned vehicles of people in this category may be searched while on state property. However, the authorization to conduct a search of a privately owned vehicle must be obtained beforehand from the Institution Head or in his absence from the next senior official on duty/on call.

11. SEARCH OF INMATE QUARTERS. When an inmate's quarters/living area is searched, the inmate should be present. If circumstances prevent the inmate's presence, at least two employees must be present during the search.

12. SEARCH OF AN ENTIRE FACILITY. When an Institution Head deems it necessary to conduct a search of the entire facility, advance approval will be obtained from the appropriate Regional Administrator. Except in emergency situations, these searches will be conducted after normal duty hours.

13. CRIME RELATED SEARCHES. In those instances where an inmate, or inmates, is/are suspected of committing an act or acts covered by criminal law, when a crime scene needs to be preserved, searches as prescribed in this policy may be conducted to detect and

preserve evidence and to help in solving possible crimes. However, such searches are to be authorized only by the Institution Head or his designee, except when in an emergency an immediate search is necessary. Under those conditions, the Institution Head will be fully informed as soon as possible after the search is made. Those authorities directing or authorizing searches under the provisions of this paragraph will ensure that safeguards are in place to prevent self-incrimination by all suspects prior to and during the search and to ensure continuous identification of accountability for detected evidence.

14. INMATES TO BE FRISK SEARCHED. All inmates in minimum, medium and maximum security facilities are subject to being frisk searched at any time. However, Institution Heads will ensure that inmates are not subjected to frisk searches as a harassment tactic.

15. PROCEDURES AND TECHNIQUES FOR FRISK SEARCHING INMATES. When preparing to frisk search an inmate, the searching officer will:

a. Ask the inmate to remove all the items in his pockets and place them in an area designated by the officer. (They must place these articles in an area away from where the search will be conducted and told, if wearing these items, to remove hat, belt, watch, coat and shoes.)

b. Require the inmate to stand still with his feet apart and his arms extended. (If the inmate is known to be or is considered a security risk, have him spread eagle against an object, wall, etc.).

c. Search all areas of the inmate's body and clothing.

d. Require the inmate to remove his/her shoes and socks. Search inside the shoes and socks and examine the bottom of each foot and shoe.

e. Examine headgear and all articles removed from pockets earlier.

If contraband is found on the inmate or there are suspicions that contraband is hidden on the body in such a way that a frisk search is inadequate, take the inmate to an area that will provide privacy and proceed with a strip search.

16. INMATES TO BE STRIP SEARCHED. An inmate may be strip searched anytime there is a reason to suspect that contraband is or might be concealed on his/her body. Also, as a deterrent measure, at irregular intervals in medium and maximum security facilities one or more inmates -- to include small groups of inmates -- may be randomly selected and subjected to a strip search even though there may not be a specific reason to suspect any of them. Otherwise, except as prescribed in a. through e. below, strip searches will be conducted only when probable cause exists. Furthermore, inmates in Work Centers, Pre-Release Centers and those inmate participants in other community residential programs will not routinely be subjected to strip searches. Inmates in the following categories will always be strip searched.

a. Newly arriving inmates from every source being processed (received) at medium and maximum security facilities.

b. Safekeepers and psychiatric patients, and all inmates returning to medium and maximum security facilities from counties after court or from Designated Facilities.

c. Inmates assigned to medium security facilities returning from outside locations.

d. Inmates returning from medium security visiting areas.

e. Inmates being processed for admission to a maximum security housing unit.

17. PROCEDURES FOR STRIP SEARCHING AN INMATE. When strip searching an inmate, two officers should always be present. Except in an extreme emergency, both of the officers must be the same sex as the inmate being searched. A strip-search will always be conducted in an area out of public view with a reasonable degree of sight and sound seclusion and as much privacy as security conditions permit. To conduct a strip search, the inmate will be required to remove all clothing, false teeth, artificial limbs, hair wigs, etc. Those items are to be closely searched, examined/inspected by one officer as they are removed while the other officer observes the inmate during removal. The search of the inmate's body will be conducted in a thorough and systematic manner.

18. PROCEDURES AND TECHNIQUES FOR FRISK SEARCHING EMPLOYEES, INMATES' VISITORS AND OTHERS. Employees, inmates' visitors and other people may be subjected to a frisk search at the discretion of the Institution Head. Frisk searches will be conducted as prescribed for inmates elsewhere in this policy. The searching officer should be the same sex as the person being searched. The contents of purses, handbags, briefcases and similar items will be searched. These items may be searched when employees, inmates' visitors, and other people are entering or departing the institution. When these items are searched, the searching officer does not have to be of the same sex as the owner of the items searched. Maximum use will be made of metal detectors (scanners) when they are available.

19. PROCEDURES AND TECHNIQUES FOR STRIP SEARCHING EMPLOYEES, INMATES' VISITORS AND OTHERS. Before an employee, an inmate's visitor or another person is asked to submit to a

strip search, the approving authority (Institution Head or in his absence, as assigned Deputy Warden/Deputy Superintendent, or Captain) must be given specific reasons to justify a strip search. The reasons must be more than vague suspicions. They must be based on specific objective facts supported by information from reliable sources that a specific person (the person to be searched) is attempting to introduce contraband into the institution. These specific objective facts are to be reduced to writing prior to or immediately subsequent to the approving authority's decision and held on file at the institution for subsequent review.

a. When the approving authority authorizes a strip search, the person to be strip searched will be asked to consent to the search by completing and signing SCDC Form 19-95, Request for a Body Search. If the person refuses to consent to the strip search, he/she will be asked to indicate his/her refusal by completing and signing SCDC Form 19-95. If the person will not sign the refusal, two employee witnesses will sign the form indicating the person would not sign. When a person refuses to consent to a strip search, he/she will be denied admission to the facility and/or will be ejected from the facility and/or property.

b. Employees, inmates' visitors and other people, except as described below for children, will be strip searched in the same manner as prescribed for inmates. Both officers must be the same sex as the person being searched.

c. Unless a child is emancipated, SCDC Form 19-95 must be completed by the parent or legal guardian of any child under the age of 18, and the parent or legal guardian must consent in writing thereon to the child being strip searched. The parent or legal guardian will be required to conduct the strip search of the child in the presence of two employees of the same sex as the child being searched. At no time during the strip search will SCDC employees touch the child. Should the parent or

legal guardian refuse to consent to the strip search of a child, he/she will be asked to indicate his/her refusal by completing and signing SCDC Form 19-95. If the parent or legal guardian will not sign the refusal, two employee witnesses will sign the form indicating the person would not sign. When a parent or legal guardian refuses to consent to a child being strip searched, he/she will be denied admission to the facility and/or will be rejected from the facility and/or property.

20. SEARCHES OF INMATES' QUARTERS AND AREAS FREQUENTED BY INMATES. Before an inmate is moved into a living area, the inmate and the living area will be searched. Additionally, the living area will be searched any time there is reason to suspect that contraband is concealed there. A complete shakedown of an inmate's quarters will include examination of such items as bars, grills, tables, doors, locks, windows, night stands, ventilators, condition of walls, floors, crevices, plumbing, and electrical equipment. Every unit of bars and grills will be tapped or shaken to determine whether they are loose or defective. Special attention will be given to such items as television sets, radios, and other personal electronic equipment, books, beds, bedding, and all other personal belongings including clothing. The inmate should be present during this search if circumstances permit. If not, at least two employees will be present.

a. Audio-visual equipment in medium-maximum security institutions will be searched upon the inmate's transfer to the institution and periodically thereafter as deemed necessary. Audio-visual equipment in minimum security institutions may be searched as specified in institutional policy. The inmate will be provided the necessary tools to dismantle the equipment him/herself, which will be done in the presence of a security officer. Should the inmate refuse to dismantle the equipment, it will be confiscated, and the inmate given the opportunity to either mail the equipment home (at his/her expense) or have it picked up. Security x-ray

equipment, if available at the institution, may be used in lieu of the above search procedures.

b. Visiting Areas: After each instance of visiting within the confines of a facility, a complete search of the visiting room(s) and adjacent rest rooms will be accomplished immediately upon termination of a visit.

c. Work Areas: Frequent searches and careful supervision of inmate workers will be accomplished. The work schedules and number of inmates employed as some job sites preclude a complete search of the job site during hours of operation. Therefore, a more thorough search of such activities can be accomplished during other than normal duty hours. Such searches will be accomplished at the discretion of the Institution Head.

d. Searches may be conducted in any other area of a facility or adjacent grounds at the discretion of the Institution Head.

21. TRAINING. All Correctional Officer Trainees will be thoroughly trained in all provisions of this policy and other related policies; and in the proper procedures and techniques for conduction frisk searches and strip searches. During the Basic Correctional Officer Training Course, all Correctional Officer Trainees will receive verbal and written instructions on how to conduct all types of searches. They will also be required to perform a frisk search under the direct supervisor of an instruction and their technique will be evaluated. An employee will not be assigned to duties requiring the conduct of searches -- including vehicle searches -- until all prescribed basic certification training relating to searches has been satisfactorily completed. This includes training prescribed in the Basic Correctional Officer Training Course as well as on-the-job training at institutional level as specified by the Institution Head. Furthermore, Institution Heads will ensure that other employees with primary duties relating mainly to

contraband control and coordination of visitors' entry and egress at a facility undergo specialized training in all provisions of this policy with special emphasis on diplomacy, professionalism and the maintenance of good public relations during the administration of the provisions of this policy.

22. INSTITUTION POLICY. Each Institution Head will develop and publish an institution policy prescribing policy and specific procedures to be followed at institution level when conducting searches for contraband. Regional Administrators will review and approve each institution's policy.

23. AVAILABILITY OF WRITTEN POLICY. Copies of this policy, copies of the institution policy and related implementing instructions will be issued to, and kept readily available in the work areas of all institutional employees whose main duties are related to contraband control and coordination of visitors entry and egress at a facility.

/s/ Parker Evatt
Parker Evatt

Supreme Court, U.S.
FILED
SEP 1
OFFICE OF THE CLERK

No. 01-277

IN THE

Supreme Court of the United States

CARMEN LEVERETTE,

Petitioner,

v.

MARGARET BELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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United States Supreme Court Rule 10 1

United States Constitution:

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REASON FOR DENYING THE WRIT

There is no reason, much less the compelling reason required by Rule 10, for the Court to exercise its discretion to review the Fourth Circuit's decision in *Leverette v. Bell*, 247 F.3d 160 (4th Cir. 2001). Petitioner brought this suit against Respondent Bell and her employer, SCDC, alleging that Respondent Bell violated her Fourth Amendment right against unreasonable searches and seizures by performing a visual body cavity search of Petitioner's person. The sole issue before the Fourth Circuit was whether the district court properly rejected Respondent Bell's assertion of qualified immunity in response to Petitioner's allegation. The Fourth Circuit conducted a *de novo* review of the record and ruled that Respondent Bell was entitled to qualified immunity, because Petitioner's Fourth Amendment right against unreasonable search and seizure had not been violated.

Petitioner seeks review of the Fourth Circuit's decision on the premise that the Court's review will resolve an alleged conflict between the circuit courts regarding the requisite degree of suspicion necessary to engage in a visual body cavity search of a correctional officer. However, the alleged conflict exists only between the Fourth Circuit and Second Circuit, because until the Fourth Circuit rendered its decision, the issue had not been addressed by any other circuit court in the 17 years following the Second Circuit's holding in *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187 (2d Cir. 1984). Moreover, the facts that formed the basis for the *Carey* court's decision differ in significant respects from the facts before the Fourth Circuit. In short, since the issue for which Petitioner seeks the review of this Court has been addressed by only two circuit courts in a period of 17 years and the cases are factually distinct, there is simply no basis for Petitioner's contention

that this Petition for Writ of Certiorari presents a significant conflict among the circuit courts or an important question of federal law that should be resolved by this Court. Therefore, Petitioner's Petition for Writ of Certiorari should be denied.

I. THE FOURTH CIRCUIT'S RULING SHOULD NOT BE REVIEWED, BECAUSE THE COURT'S REVIEW WILL NOT RESOLVE A SIGNIFICANT CONFLICT BETWEEN THE CIRCUIT COURTS.

Petitioner contends that the Court's review of this matter will permit the Court to resolve a conflict between the Fourth Circuit's ruling and the Second Circuit's holding in *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187 (2d Cir. 1984). In *Carey*, the Second Circuit held that prison authorities must obtain a search warrant based on probable cause before they may perform a visual body cavity search on a correctional officer. *Carey*, 737 F.2d at 208. In contrast, the Fourth Circuit found that "prison authorities generally may conduct a visual body cavity search when they possess a reasonable and individualized suspicion that an employee is hiding contraband on his or her person." *Leverette v. Bell*, 247 F.3d 160, 168 (4th Cir. 2001). However, on the sole issue before the Fourth Circuit — whether Respondent Bell was entitled to qualified immunity — the *Carey* court, like the Fourth Circuit, found that the prison authorities who conducted the search were entitled to qualified immunity even though they had not obtained a warrant. Thus, even if the Court found in Petitioner's favor and determined that the challenged search was unconstitutional, this determination would not be dispositive of the Fourth Circuit's holding.

Petitioner's contention that a significant conflict exists between the Second and Fourth Circuits is further undermined by the factual record in *Carey*, which differed in significant

respects from the findings of fact made by the Fourth Circuit in its *de novo* review of the record. These differences are of particular importance in this matter, because an analysis of the Fourth Amendment's prohibition against unreasonable searches is inherently fact-driven. In the first instance, to determine whether a search is reasonable, the search must be viewed in the context of an individual's legitimate expectations of privacy. *Carey*, 737 F.2d at 201. The *Carey* court applied the twofold test articulated by this Court in *Katz v. United States*, 389 U.S. 347, 361 (1967), to determine if a legitimate expectation of privacy existed with respect to the challenged visual body cavity searches. Under this test, the defendant correctional officers first had to exhibit an actual (subjective) expectation of privacy. The *Carey* court found in favor of the officers on this issue, because there was no evidence in the record which would indicate that the correctional officers did not exhibit an actual subjective expectation of privacy. *Carey*, 737 F.2d at 201. Because the *Carey* court determined that the officers had an actual or subjective expectation of privacy, the court reached the second prong of the test articulated in *Katz*. Under this prong, the correctional officers had to demonstrate that their subjective expectation of privacy was one that society was prepared to recognize as reasonable. *Id.* at 201. On this point, the *Carey* court stated only that it believed society was prepared to recognize that an expectation of privacy existed with respect to the challenged searches. *Id.* at 208. The *Carey* court did not state why or upon what facts it based its opinion in this regard. However, it is indisputable that society's reasonable expectations may have changed in the 17 years that have elapsed since the Second Circuit's decision in *Carey*.

In short, Petitioner cannot dispute that the analysis employed by the *Carey* court to determine whether the challenged search was reasonable was premised on

determinations of fact. Nor can Petitioner contend that the relevant facts underlying the decision in *Carey* existed in the record before the Fourth Circuit. In fact, the Fourth Circuit expressly relied on the *Carey* decision in ruling that the search challenged by Petitioner was reasonable, at least in part because of her diminished expectations of privacy "in light of the prison's manifest interest in preventing the introduction of drugs, weapons, and other contraband." *Leverette v. Bell*, 247 F.3d 160, 168 (4th Cir. 2001) (citing *Carey*, 737 F.2d at 204). In citing to the Second Circuit's opinion in *Carey* for this proposition, the Fourth Circuit implicitly distinguished the relevant facts in its record from those found determinative by the *Carey* court. Thus the Fourth Circuit's ruling arguably stands only for the proposition that a correctional officer's actual or subjective expectation of privacy is an individualized, fact specific determination. This conclusion is borne out by the Fourth Circuit's use of the term "generally" to define when prison authorities may conduct visual body cavity searches without a warrant and its express emphasis "that reasonable suspicion is the minimum requirement, and . . . the more personal and invasive the search activities of the authorities become, the more particularized and individualized the articulated supporting information must be." *Id.*

Under the standard it articulated, the Fourth Circuit stated that it was satisfied that the challenged search was constitutional because the supporting information was particularized and individualized. Specifically, Respondent Bell received information that Petitioner would be bringing contraband into the prison in a tampon on a specific date. The information also "bore indicia of reliability," because the source providing the information had provided accurate drug-related tips in the past. *Id.* Finally, the Fourth Circuit

noted that the search itself, which was conducted by female officials in a private setting, "was administered in a sensitive and professional manner." *Id.* In contrast, the *Carey* court stated that there was no evidence in the record to indicate that contraband had ever been carried into the subject correctional facilities by correctional officers in their body cavities. *Carey*, 737 F.2d at 208. Further, the defendant correctional authorities in *Carey* had not received any particularized or individualized information regarding the correctional officers who were searched. In fact, several of the correctional officers who were searched were selected at random and others merely on the basis of hearsay and rumor. *Id.* at 195.

Despite the apparent differences between the relevant facts before the *Carey* court and those reviewed by the Fourth Circuit, in a disingenuous effort to grab the Court's attention, Petitioner falsely concludes that the Fourth Circuit's ruling "in essence" gives correctional officers "less constitutional protection than the inmates they are hired to guard." Pet. at 15. This conclusion is patently incorrect. In *Bell v. Wolfish*, 441 U.S. 520, 576-77 (1979), this Court upheld a prison's practice of conducting visual body cavity searches on inmates following every contact visit, regardless of individualized suspicion. In contrast, the Fourth Circuit expressly held that reasonable, individualized suspicion is the ***minimum*** level of suspicion necessary to conduct a visual body cavity search when the subject of the search is a correctional officer. Thus the minimum standard articulated in the Fourth Circuit's ruling clearly exceeds the standard approved by the Court for inmates.

As stated by the Fourth Circuit, "[t]he Court's decision in *Bell v. Wolfish* made clear that the 'unique security dangers'

present in correctional facilities may justify even the most intrusive searches. . . ." *Leverette*, 247 F.3d at 167. The factual context of a search is relevant, because to determine if a search is reasonable, a court ultimately must evaluate "'the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'" *Id.* at 166-67 (quoting *Bell v. Wolfish*, 441 U.S. at 559). The Fourth Circuit fully evaluated these factors in making its decision that the visual body cavity search of Petitioner's person constituted a "reasonable" search within the meaning of the Fourth Amendment and, upon doing so, articulated a minimum standard based on the unique and individualized facts before it. Thus any distinction between the decisions of the Fourth and Second Circuits is premised on the particular facts before each court and does not present a compelling reason for this Court's review.

II. THE FOURTH CIRCUIT'S RULING SHOULD NOT BE REVIEWED, BECAUSE THE COURT'S REVIEW WILL NOT RESOLVE AN IMPORTANT ISSUE OF FEDERAL LAW.

In addition to her contention that the challenged search was unconstitutional, Petitioner also asks the Court to review the Fourth Circuit's determination that Respondent Bell acted within the scope of her discretionary authority. However, Petitioner does not contend that her request in this regard should be granted because it presents an important question of federal law or on the basis that the Court's review would resolve an important conflict among the circuits. In fact, the Court's review would not accomplish either objective, because the asserted error consists only of alleged erroneous factual findings and the purported misapplication of a well-settled rule of law.

Petitioner disputes the Fourth Circuit's determination that Respondent Bell was acting within the scope of her discretionary authority when she conducted the visual body cavity search of Petitioner's person. Petitioner argues that Respondent Bell was not acting within the scope of her discretionary authority because SCDC's policies expressly prohibited Respondent Bell from performing the challenged search and that the Fourth Circuit improperly "ignored" these policies in making its decision. Pet. at 13. Petitioner's contention is without merit. To the contrary, the Fourth Circuit expressly found that it was "not clear" whether Respondent Bell "engaged in conduct specifically precluded by SCDC policy." *Leverette*, 247 F.3d at 165. Therefore, Petitioner's real contention is not that the Fourth Circuit ignored the potentially relevant policies, but merely that it made an erroneous finding of fact with respect to the legal import of these policies.

Pursuant to its finding that Respondent Bell acted within the scope of her discretionary authority, the Fourth Circuit then addressed the constitutionality of the challenged search. It is well settled that a government official may be "shielded from individual liability for damages arising from acts within the scope of their discretionary authority, provided that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pet. at 12 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Petitioner now disputes and seeks review of the Fourth Circuit's determination that the challenged search was constitutional on the basis that it does not comport with the Second Circuit's decision in *Carey* on this issue. Pet. at 7. However, the fact that the Fourth Circuit rendered a decision that purportedly conflicts with that of another circuit itself demonstrates that Respondent Bell's conduct did not violate a clearly established statutory or constitutional right. This is

particularly true in the instant matter, because the Fourth and Second Circuits are the only two circuits that have addressed the constitutionality of conducting a visual body cavity search of a correctional officer without a warrant. Given the dearth of legal precedent on this issue and the complete absence of binding legal precedence in the Fourth Circuit, Petitioner cannot validly claim that the challenged search violated a clearly established statutory or constitutional right. Further, as discussed in Section I, since there is no evidence that the alleged right was clearly established, even assuming *arguendo* that the challenged search was not constitutional, such a finding would not negate the Fourth Circuit's holding that Respondent Bell was entitled to qualified immunity. In light of the above, there is simply no basis for Petitioner's contention that the Fourth Circuit's decision was improper. Rather, the Fourth Circuit rendered a well-reasoned decision based on the unique and individualized facts before it.

CONCLUSION

For all of the foregoing reasons, Respondent Bell respectfully requests that this Honorable Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 01-277

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In The Supreme Court of the United States

CARMEN LEVERETTE,

Petitioner,

v.

MARGARET BELL, in her individual capacity,

Respondent.

and

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Defendant.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourth Circuit's decision in this case establish a general principle of Fourth Amendment law, which conflicts with the Second Circuit's decision on the same constitutional issue?

2. Does the Fourth Circuit's analysis of the qualified immunity issue in this case implicate an important question of federal jurisprudence, and conflict with decisions from this Court and other circuits?

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Warden v. Hayden, 387 U.S. 294 (1967) 1, 6

The Fourth Circuit's decision in this case establishes a general principle of Fourth Amendment law that directly conflicts with the Second Circuit's decision on the same constitutional issue.

Respondent contends the Petition should be denied because Fourth Amendment analysis is "inherently fact-driven," and the Fourth Circuit's decision in this case represents nothing more than different factual determinations from those at issue in *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187 (2nd Cir. 1984). Taken to its logical conclusion, the result of Respondent's argument is the absence of any underlying legal principles governing Fourth Amendment issues, and courts need look no further than the facts of the case before them when confronted with a Fourth Amendment challenge. Such a result defies all understanding of Fourth Amendment jurisprudence.

There are certain underlying principles of constitutional law that apply regardless of a particular fact situation. For instance, as a general rule, in the absence of exigent circumstances, the Fourth Amendment requires government officials to obtain a warrant before searching someone who is not under arrest. *Katz v. United States*, 389 U.S. 347 (1967); *Warden v. Hayden*, 387 U.S. 294 (1967). Thus, when faced with a Fourth Amendment challenge to a warrantless search, courts must analyze the facts of the particular case in light of that general rule.

In this case, the question of law at issue is what standard applies (probable cause or reasonable suspicion) to visual body cavity searches of prison employees. The Second Circuit expressly held that

probable cause is required, while the Fourth Circuit has now held that prison officials need only have a reasonable suspicion before conducting such searches.

The Second Circuit decided the question of law in *Carey* by holding that warrantless visual body cavity searches of prison employees are unconstitutional. Since it was undisputed that prison officials did not obtain warrants prior to conducting the searches, the facts surrounding the actual searches were basically irrelevant to the Fourth Amendment analysis. The court held the searches were unconstitutional, and the only factual questions went to the qualified immunity issue. Even though seventeen years have passed, *Carey* is still the law in the Second Circuit, and absent exigent circumstances, prison officials in that circuit must obtain a warrant before subjecting an employee to a visual body cavity search.

There can be no doubt that the search at issue in this case was unconstitutional under the *Carey* analysis. As a result of the Fourth Circuit's decision, however, prison officials in this circuit are never required to obtain a warrant to conduct a visual body cavity search of an employee, but need only articulate a reasonable suspicion.

Respondent attempts to downplay the significant conflict between the circuits on this fundamental constitutional issue by asserting that the sole issue before the Fourth Circuit in this case was whether Respondent was entitled to qualified immunity. While the qualified immunity issue was the only issue addressed by the district court, and briefed by the parties before the Fourth Circuit, the Fourth Circuit's decision goes far beyond the qualified immunity issue.

Rather, it establishes a general principle of Fourth Amendment law that is not dependent on the particular facts of this case, but directly implicates the constitutional rights of countless prison employees.

By specifically prohibiting body cavity searches of prison employees, the State of South Carolina recognized that body cavity searches are inherently demeaning and indecent, and acknowledged that its prison employees had a legitimate expectation to be free from such searches. A general recognition of this expectation of privacy may well explain the lack of case law on the issue since *Carey* was decided in 1984.

The Fourth Circuit has now usurped that recognized expectation of privacy, however, and established a general principle of law directly contrary to the principle established by the Second Circuit in *Carey*. Prison employees in the Fourth Circuit are no less entitled to Fourth Amendment protection than the prison employees in the Second Circuit. Granting the Petition will allow this Court to resolve the conflict created by the Fourth Circuit's decision.

The Fourth Circuit's analysis of the qualified immunity issue in this case involves an important question of federal jurisprudence, and its holding on this issue conflicts with decisions from this Court and other circuits.

Respondent also asserts that this Court should not review the Fourth Circuit's holding that she was entitled to qualified immunity, because the issue does not involve an important question of federal law, or a conflict among the circuits. Contrary to this assertion, the Fourth Circuit's analysis directly

impacts the qualified immunity analysis in federal court actions against state officials. Further, its analysis and ultimate conclusion are contrary to decisions from this Court and other circuit courts.

As a threshold matter, before government officials may be shielded from individual liability for damages arising from acts in their official capacity, their conduct must be within the scope of their discretionary authority. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *In re Allen*, 106 F.3d 582, 593 (4th Cir. 1997). Regulations and statutes governing an official's position will most often govern the scope of his authority. *Doe v. McMillan*, 412 U.S. 306, 321-324 (1973) (official's authority defined by statutes dictating duties of the Public Printer and Superintendent of Documents); *Allen*, 106 F.3d at 595 (statutes regarding duties of state attorney general defined scope of authority); *Lenz v. Winburn*, 51 F.3d 1540, 1546-47 (11th Cir. 1995) (Florida statutes and training manual for Florida guardian ad litem program defined scope of guardian ad litem's authority); *Long v. Norris*, 929 F.2d 1111, 1116-18 (6th Cir. 1991) (qualified immunity did not bar suit against prison officials who violated prison regulations prohibiting strip searches without probable cause).

Thus, under the case law cited above, the scope of Respondent's authority to conduct and supervise employee searches was defined by the policies governing her position as assistant warden. Those policies significantly limited the scope of her discretionary authority regarding employee searches in general, and expressly prohibited body cavity searches of employees. Contrary to the Fourth Circuit's finding that it was "not clear" Respondent violated the policies when she ordered and conducted

the visual body cavity search at issue, it is abundantly clear from the unambiguous policy language, as well as the testimony in the record, that employee body cavity searches were prohibited, and the Respondent was well aware of the limitations regarding the scope of her authority.

The Fourth Circuit expressly based its conclusion regarding the scope of Respondent's authority on its finding that "assistant wardens of correctional facilities routinely supervise searches." (Appendix at p. A-9). Moreover, the court indicated that it did not consider the SCDC policies in defining the scope of Respondent's authority. Id. Thus, in the context of its qualified immunity analysis, the Fourth Circuit clearly ignored the applicable policies.

Since Respondent exceeded the scope of her authority as determined by the policies governing her position, she is not entitled to the qualified immunity defense as a matter of law. Respondent contends she is entitled to the defense's protection, however, because her conduct did not violate a clearly established constitutional right. (Br. in Oppo., pp. 7-8). The Fourth Circuit specifically declined to reach this issue in light of its holding that the search at issue was constitutionally valid. (Appendix at page A-15).

Respondent's argument requires an assumption that in the absence of case law clearly establishing otherwise, warrantless body cavity searches of prison employees are "reasonable" as a matter of law for qualified immunity purposes. Fortunately for United States residents, the opposite is true. Fourth Amendment analysis starts with the general proposition that in the absence of exigent

circumstances, such intrusive searches require probable cause and prior judicial approval.[1] *Katz*, supra; *Warden*, supra.

In 1984, the Second Circuit held that prison employees have a legitimate expectation they will not be subjected to visual body cavity searches without prior judicial approval. This general principle of Fourth Amendment law was apparently so undeniable that no court held otherwise until the Fourth Circuit issued its decision in this case.

In 1992, the South Carolina Department of Corrections implemented a policy recognizing its employees' legitimate expectations of privacy regarding body cavity searches, and specifically prohibited such searches. Even if Respondent was not aware of the *Carey* decision, the prison employees' legitimate expectations of privacy regarding body cavity searches were embodied in SCDC's policies, of which she was well aware. Consequently, she cannot legitimately assert ignorance regarding the constitutional issue before the Court.

Case law clearly establishes that courts must consider applicable statutes, rules, regulations and policies, to determine the scope of an official's discretionary authority in the context of a qualified immunity analysis. The Fourth Circuit expressly ignored the applicable policies in this case in holding that Respondent acted within the scope of her discretionary authority when she ordered and conducted the visual body cavity search at issue. Granting the Petition will afford the Court an

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[1] Respondent does not, and could not, contend there were exigent circumstances in this case that precluded prior judicial approval of the search at issue.

opportunity to resolve the question of what courts must consider in determining the scope of an official's discretionary authority.

CONCLUSION

Based on the foregoing, and the arguments set forth in the Petition, the Petitioner Carmen Leverette respectfully submits that the Petition should be granted, and the Fourth Circuit decision should be reversed.

This the 27th day of September, 2001.

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